

SEP 4 1947

CHARLES ELMORE BROFLEY
CLERK

In the Supreme Court of the United States

October Term 1947

No. 215

In the Matter of William Oliver,
Petitioner.

On application for cer-
tiorari to the Supreme
Court of the State of
Michigan.

Brief Opposing Petition for Certiorari

Eugene F. Black
Attorney General of the State of
Michigan

Edmund E. Shepherd
Solicitor General of the State of
Michigan

H. H. Warner
Assistant Attorney General of the
State of Michigan

Counsel for Respondent
State of Michigan

Index

| | Page |
|---------------------------------------------------------------------------------------------------------------------------|------|
| I Reference to official report of opinions delivered in court below | 1 |
| II Counter-statement concerning jurisdiction | 2 |
| III Counter-statement of the case | 3 |
| IV Argument | |
| Point One: Decisive, substantial, nonfederal grounds underlie and sustain the order of the court below | 8 |
| Point Two: Thus it appears that the questions presented in the petition for certiorari rest on false premises | 14 |
| V Conclusion | 16 |

Authorities Cited:

| | |
|--------------------------------------------------------------------|-------|
| Abie State Bank v. Weaver, 282 U.S. 765 | 9 |
| Adamson v. California, No. 102 October Term 1946 | 9 |
| A T & S F Ry. Co. v. California, 283 U.S. 380 | 8 |
| Cohen, In re, 295 Mich. 743 | 7 |
| Hartley, In re, 317 Mich. 441 | 5, 10 |
| Indiana, State of, ex rel. Anderson v. Brand, 303 U.S. 95 | 9 |
| Michael, In re, 326 U.S. 224 | 15 |
| Mundy v. McDonald, 216 Mich. 44 | 7, 11 |
| Palko v. Connecticut, 302 U.S. 319 | 10 |

| | Page |
|-------------------------------------------------------------------|--------------|
| People v. Wolfson, 264 Mich. 409..... | 7, 11 |
| Radio Station WOW v. Johnson, 326 U.S. 120..... | 9 |
| Richardson Machine Co. v. Scott, 276 U.S. 128..... | 9 |
| S. W. Bell Telephone Co. v. Oklahoma, 303 U.S. 206..... | 9 |
| Sages Stores Co. v. Kansas ex rel. Mitchell, 323 U.S. 32 | 8 |
| Slattery, In re, 310 Mich. 458..... | 4, 7, 11, 14 |
| United States v. Appel, 211 Fed. 495..... | 12, 15 |
| Williams v. Kaiser, 323 U.S. 471..... | 8 |
| Wood, Emery T., In re, 82 Mich. 75..... | 7 |

In the Supreme Court of the United States

October Term 1947

No. 215

**In the Matter of William Oliver,,
Petitioner.**

**On application for cer-
tiorari to the Supreme
Court of the State of
Michigan.**

Brief Opposing Petition for Certiorari

I

**Reference to official report of opinions delivered in court
below. [*]**

The prevailing (22-28) and 'dissenting' (28-32) opinions delivered in the court below, [1] are officially reported 'In the Matter of William Oliver', 317 Mich. 7.

The prevailing and 'dissenting' opinions delivered in the

[*]

Unless otherwise plainly indicated by the context, numbers in parentheses refer to pages of the printed record.

[1]

Culminating in an order (32) dismissing a writ of habeas corpus and an ancillary writ of certiorari to inquire into the legality of petitioner's summary conviction (15) of contempt of court.

court below 'In the Matter of Hartley' (a companion case) are officially reported in 317 Mich. 441.[2]

II

Counter-Statement Concerning Jurisdiction.

Counsel for petitioner urge (p. 3) that his 'summary conviction . . . of contempt of court . . . was a denial' of due process guaranteed by the 14th Amendment; and they invoke the jurisdiction of this Court under § 237 (b) of the Judicial Code as amended (28 USC § 344 [b]).

Our position, concisely stated, is that such a denial of due process was not claimed in the petition (2) for habeas corpus filed in the court below; [3] that all questions, however raised, drawing into the controversy the matter of 'due process', were answered by the court below in construing local legislative enactments; that members of the court below expressed contrary opinions relating to inferences to be drawn from the testimony which petitioner gave before the grand jury (whether it was evasive or frank and candid); and that substantial nonfederal grounds underly the decision of the Michigan Supreme Court.² There is, therefore, we suggest, a reasonable doubt of this Court's

[2]

In each case members of the court divided equally, 4-4, on the question whether 'the record showed . . . evidence of falsifying' testimony or 'evasive' replies to questions asked the petitioner when called as a witness before a 'one-man grand jury'.

[3]

While it appears from the opinion (26) of the Chief Justice (which prevailed) that in the brief filed on behalf of petitioner it was contended, inter alia, that his conviction violated the due process clause of the 14th Amendment, but opinion itself discusses a controlling nonfederal question.

jurisdiction under § 237 (b) of the Judicial Code, as interpreted in Court Rule 38.

III

Counter-Statement of the Case.

We respectfully note the following inaccuracies and insufficiencies in the petition for certiorari and counsel's supporting brief:

1. It is insufficient to say, as counsel do (p. 7), that the circuit judges deemed petitioner's testimony (10-14) '*untruthful*', for they also held it (9) '*evasive*'; and the prevailing opinion (22) delivered in the court below by Mr. Chief Justice Carr, as well as the prevailing opinion delivered by Mr. Justice Dethmers in the companion case of Hartley (p. 16), dwelt largely upon the fact that the testimony of each witness ~~was~~ '*evasive*' rather than upon the finding that it was '*untruthful*'.^[4]

2. In the petition for certiorari (p. 5), under the captions 'How Questions Raised' and 'Reasons for Allowance of Writ', there are many 'off-the-record statements' reflecting somewhat more heat than light. Reference to 'scores of Michigan citizens' who 'have been summarily convicted of

[4]

This would seem important to consider in determining jurisdiction. If the sole question decided by the circuit judges was whether petitioner's testimony was '*untruthful*', it might strongly be urged that without due notice followed by a hearing at which it would be incumbent upon the judges to establish the fact of perjury by countervailing proof, due process would be denied. If, however, the petitioner's answers given in the presence of the judges, were evasive and unresponsive, due process would not be denied in summarily adjudging him guilty of contempt.

contempt of court, even though they have never been before a court, by judges acting as one-man grand jurors', who 'do this without restraint', and to the practice of the Michigan Supreme Court in reviewing such orders, is wholly gratuitous.[4a]

3. In their summary of facts counsel assert (p. 7) that petitioner contended in the court below that his imprisonment was 'a denial of due process'. 'That court', it is correctly said, 'by a four-to-four decision sustained his conviction, one half holding there was contempt and the other half holding there was no contempt'. But they are mistaken when they intimate (p. 8) that the questions raised were considered in their federal aspect or decided by applying federal tests of due process. All of which appears from the following:

(a) The petition (2-4) for writ of habeas corpus (drafted by a lawyer) does not allege any violation of rights guaranteed by the Fourteenth Amendment. On the contrary, after reciting the facts, petitioner's attorney stated (3) that the illegality of petitioner's confinement consisted 'in this, to wit', and he set forth five grounds on which he based his prayer for relief.[5] But he did not aver that the procedure

[4a]

To say, as counsel do, that a Michigan circuit judge who sits as a one-man grand jury (Mich. Comp. Laws 1929, §§ 17215-17220 [Mich. Stat. Ann. §§ 28.941-28.946]) performs no judicial function, and that he is not a court, runs contrary to established Michigan law. In re Slattery, 310 Mich. 458; certiorari denied, 325 U.S. 876.

[5]

Such grounds when summarized amount to this: (a) that petitioner was not guilty of contempt; (b) that no formal order was signed on the day he was incarcerated (though it was later); (c) that his conduct did not evince contempt; (d) that he was denied the benefit of counsel (a question not decided below or pressed here); and (e) that he was not confined by virtue of any legal commitment as required by Michigan law.

of the circuit judges violated the due process clause of the Fourteenth Amendment to the Federal Constitution.

(b) The prevailing opinion (22) delivered below notes (26) that in the brief filed on his behalf petitioner contended that his summary conviction of contempt constituted a denial of due process and hence a violation of the Fourteenth Amendment,[6] and that contemptuous behavior toward a grand jury conducting a statutory investigation,[7] was not contempt of court. But it does not discuss the federal question, merely holding that it possesses no merit by virtue of the opinion of Mr. Justice Dethmers delivered in a companion case.[8] And the Chief Justice then proceeds to consider the controlling question in the case, 'whether, as a matter of fact, plaintiff was guilty of contempt of court', holding that 'an examination of the testimony given by Oliver (the petitioner) with reference to his dealings with Mitchell leads to the conclusion that plaintiff sought to withhold his real reason, or reasons, for paying money to Mitchell, ostensibly for the bonds'. 'It is apparent', the Chief Justice continues (27), 'that for some reason he did not wish to disclose to the grand juror the precise nature of his dealings with Mitchell. His evasive replies clearly tended to obstruct the investigation and were in consequence contemptuous in character. It is scarcely conceivable that

[6]

Such denial, it was argued (26), consisted of a failure to file charges, give the accused notice of hearing, and a hearing thereon. The answer was that petitioner was guilty of contemptuous conduct in the immediate presence of the court.

[7]

Under the Michigan 'one-man grand jury law'. Michigan Code of Criminal Procedure, chap. 7, §§ 1-6 (3 Comp. Laws Mich. 1929, §§ 17215-17220 [Mich. Stat. Ann. §§ 28.941-28.946]).

[8]

In re Hartley, 317 Mich. 441; also published on pp. 16 et seq., petition for certiorari and supporting brief.

plaintiff did not know the real reason why he took these so-called bonds from Mitchell, and paid money to the latter'.^[19]

Three other justices joined with the Chief Justice in signing (28) the foregoing opinion.

(c) Mr. Justice North, with whom three associates concurred (32), wrote an opinion (28-32) to the contrary, holding that on the record before them, which did not contain testimony by plaintiff which was evasive or which showed he falsified, 'our conclusion is that plaintiff was unjustly committed for contempt of court', and for that reason the judgment entered in the circuit court should be vacated. In this opinion, the precise issue was defined (28) as follows:

"Hence the scope of our review is this: Is there any competent evidence in the record in support of the finding below that when plaintiff was testifying he gave answers which were (1) evasive or (2) false?"

(d) As heretofore stated, the prevailing opinion delivered below refers to the opinion of Mr. Justice Dethmers in the companion case of *Hartley* (317 Mich. 441).

That opinion notes that plaintiff, Hartley, urged that his sentence for contempt (during the course of the same investigation) was illegal on the ground, *inter alia*, that due process had been denied. In this regard Mr. Justice Dethmers held that such questions of due process were directed to the same general question of the right of the judge, 'under the circumstances here presented, to summarily adjudge one

[19]

It is a fair inference, to be drawn from the entire record, that the circuit judge, acting as a one-man grand jury, assisted by two brother judges, was investigating to determine whether there was cause to charge Mitchell with some species of extortion.

guilty of contempt without filing of charges, notice and hearing thereon' (petition for certiorari, p. 19). And held: (1) that in conducting a so-called one-man grand jury investigation (under Michigan law), a circuit judge acts in a judicial capacity;^[10] (2) that the Michigan Supreme Court has previously upheld the power of a circuit judge, acting as a one-man grand jury, to punish summarily for contempt;^[11] and (3) that plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. 'It was', said the Justice, 'direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in' Michigan law.^[12]

(e) The contra opinion (petition, pp. 27-29) written by Mr. Justice Boyles in the companion case of *Hartley*, while commenting on the fact that Hartley 'was without counsel', and that he was summarily sentenced 'to 60 days in the county jail for alleged contempt of court', nevertheless turned on the question whether one could 'infer from the testimony . . . that Hartley was giving evasive or false answers', an inference which Mr. Justice Boyles and three of his associate justices were unable to accept. And he closes his opinion with the following:

[10]

Citing Michigan authority: *Mundy v. McDonald*, 216 Mich. 44; *In re Slattery*, 310 Mich. 458 (certiorari denied, 325 U.S. 876).

[11]

Likewise, on the authority of Michigan decisions: *People v. Wolfson*, 204 Mich. 409; *In re Cohen*, 295 Mich. 743; and *In re Slattery*, *supra*, footnote 10.

[12]

Citing: 3 Comp. Laws Michigan 1929, § 13912 (Mich. Stat. Ann. § 27.513); 3 Comp. Laws Michigan 1929, §§ 13910-13911 (Mich. Stat. Ann. §§ 27.511-27.412). *In re Emery T. Wood*, 82 Mich. 75.

"Inasmuch as the record does not contain any evidence tending to support the finding of evasiveness or untruthfulness in the answers given by plaintiff, the order of his commitment under which he technically is still in custody is hereby vacated" . . . (petition, p. 29).

IV

The Argument.

Point One

Decisive, substantial, nonfederal grounds underlie and sustain the order of the court below.

We respectfully suggest several cogent reasons to doubt jurisdiction under § 237 (b) of the Judicial Code as amended, which in view of the foregoing counter-statement of the case may be somewhat hastily summarized:

1. Determination of jurisdiction is controlled by Hornbook rules of law familiar to the Court.

(a) The decision of a state supreme court is considered binding on this Court insofar as state law and its interpretation or construction are concerned.^[13]

(b) The Court will decline jurisdiction to review a state court decision unless it appears affirmatively not only that a federal question was presented for decision but that the state court's decision of the federal question was necessary to determination of the cause, that the federal question was

[13]

A., T., & S. F. R'y Co. v. California, 283 U.S. 380; Sages Stores Co. v. Kansas ex rel. Mitchell, 323 U.S. 32; Williams v. Kaiser, 323 U.S. 471.

actually decided, or that the judgment as rendered could not have been given without deciding it;[14] and the Court will examine the opinion of the state court to ascertain whether a federal question was raised and decided, and whether the state court rested its judgment on adequate nonfederal grounds.[15]

(c) . The Court has dismissed a writ of certiorari where the state court's decision rested on a nonfederal ground, notwithstanding the latter's unnecessary discussion of a constitutional question,[16] and it will not review a state court decision resting on adequate and independent nonfederal ground, although the decision also rests upon an erroneous view of federal law.[17] The question for determination is whether a nonfederal ground independently supports the judgment of the state court.[18]

(d) And finally there is the maxim that a State may control its criminal procedure 'in accordance with its own idea of the most efficient administration of criminal justice',[19] with which this Court will never interfere unless

[14]

S.W. Bell Telephone Co. v. Oklahoma, 303 U.S. 206.

[15]

State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95.

[16]

Geo. O. Richardson Machine Co. v. Scott, 276 U.S. 128.

[17]

Radio Station WOW v. Johnson, 326 U.S. 120.

[18]

Able State Bank v. Weaver, 282 U.S. 765.

[19]

Adamson v. California, No. 102 October Term 1946, decided June 23, 1947; slip opinion, p. 10.

there is a manifest infringement of some fundamental right or privilege guaranteed by the Federal Constitution or its Amendments.[20]

2. The only reference throughout the entire record to the Constitution of the United States,[21] is found in the opinion (22-28) of Michigan's Chief Justice, who said (26):

"In the *brief* (our emphasis) filed on behalf of plaintiff it is contended, first, that plaintiff's summary conviction of contempt constituted a denial of due process of law and hence violated art. 2, § 16, of the State Constitution, and § 1 of the Fourteenth Amendment to the Federal Constitution; second, that due process of law, under both the State and Federal Constitutions, required the filing of charges, notice of hearing to the accused, and a hearing on such charges; third, that contemptuous misbehavior toward a grand jury conducting an investigation under the statutory provisions above cited is not contempt of court".

The Chief Justice then noted that in a similar companion case decided April 17, 1947,[22] the foregoing questions were all raised and discussed at some length by Mr. Justice

[20]

Palko v. Connecticut, 302 U.S. 319, 325.

[21]

Again, it may be noted for what it is worth, that petitioner did not in his application for habeas corpus claim a violation of rights guaranteed by the Federal Constitution.

[22]

In *re Hartley*, 317 Mich. 441. See petition, p. 18 et seq.

Dethmers in his opinion,^[23] 'and', he said, 'it is unnecessary to repeat what was there said. The claims made are without merit' (26).

It is therefore important to observe that in the companion case of Hartley, *supra*, Mr. Justice Dethmers did not apply federal tests to given premises in order that he might determine whether petitioner's liberty had been taken without due process of law. The effect of his decision was to hold that *under Michigan law as construed by him*, the circuit judge had power and authority, 'under the circumstances here presented, to summarily adjudge one guilty of contempt without filing of charges, notice and hearing thereon'.^[24] The circuit judge, in other words (p. 20), 'while acting as a one-man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith'.

"Plaintiff's contempt (he continued), if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided (*by*

[23]

The conviction of Hartley for contempt, committed under circumstances analogous to those in the case at bar, and during the same grand jury investigation, was sustained by an evenly divided court whose members disagreed on the inferences to be drawn from the testimony of the witness.

[24]

Such a circuit judge acts in a judicial capacity, the justice noted on authority of *Mundy v. McDonald*, 216 Mich. 44, and *In re Slattery*, 310 Mich. 458; certiorari denied, 325 U.S. 876. And he observed that the court had previously upheld the power of a circuit judge to punish summarily for contempt. *People v. Wolfson*, 264 Mich. 409; *In re Cohen*, 295 Mich. 743.

Michigan law).^[25] It was properly dealt with summarily".^[26]

3. Mr. Justice Dethmers then proceeds to the core of the problem and asks (pp. 20-26) the question (p. 20):^[27] 'Was plaintiff (Hartley), in fact, guilty of contempt?'^[28] A question which he answers with an emphatic affirmative, stating among other things:

"No more graphic demonstration of frantic flight from one untenable position to another could be imagined. . . . Plaintiff's answers were obvious attempts to fob off inquiry; they were evasive and inconsistent; they reveal a manifest desire and attempt to conceal plaintiff's real reason for purchasing the bonds; they amount to sham, fully as effective in thwarting proper inquiry by the court as an absolute refusal to answer questions at all".^[29]

[25]

3 Comp. Laws 1929, § 13912 (Stat. Ann. § 27.513).

[26]

Under Michigan law: citing 3 Comp. Laws 1929, §§ 13910-13911 (Stat. Ann. §§ 27.511-27.512); *In re Emery T. Wood*, 82 Mich. 75.

[27]

These parenthtic references to the opinion of Mr. Justice Dethmers, refer to pages of the petition for certiorari.

[28]

The opinion was based upon the following established principle of Michigan law: 'The return (to certiorari) must be taken as true. . . . We may and it is our duty to examine the testimony to see if there is any evidence to support the finding. If there is we cannot measure it'. *People v. Doe*, 226 Mich. 5.

[29]

Citing: *United States v. Appel*, 211 Fed. 495-6, where it is said: 'If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry'.

4. The prevailing opinion of the Chief Justice in the case at bar is equally emphatic in determining (26-28) that Oliver, the petitioner, sought to *withhold* the truth; that the grand juror and his associates were fully justified in concluding 'that Oliver was intentionally evasive'.

"What was said by Justice Dethmers in the Hartley case, *supra*, with reference to testimony of Hartley, may well be applied to the statements of Oliver. It is apparent that for some reason he did not wish to disclose to the grand juror the precise nature of his dealings with Mitchell. His evasive replies clearly tended to obstruct the investigation and were in consequence contemptuous in character".

And he held (27) that, since the circuit judges had the advantage of hearing plaintiff's testimony and of noting his demeanor in giving it, 'the conclusion reached finds support in the record':

5. As heretofore stated, eight justices of the court below divided equally on the major question involved and the judgment was sustained. The decisive and decisive question was whether 'there was any competent evidence in the record in support of the finding below that when plaintiff was testifying he gave answers which were (1) evasive or (2) false' (opinion of Mr. Justice North, 28). And the substance of the 'dissenting' opinions, as expressed by Mr. Justice North in the present case (32), was that

"on the record before us, which does not contain testimony by plaintiff which was evasive or which showed he falsified, our conclusion is that plaintiff was unjustly committed for contempt of court".

Or, as stated by Mr. Justice Boyles in *Hartley* (p. 28):

"I am not able to infer from the testimony, as quoted by Mr. Justice Dethmers, that Hartley was giving evasive or false answers, as found by the sentencing grand juror".

Not one of the 'dissenters' [30] held as a matter of law that the petitioner (Oliver) or the plaintiff (Hartley) had been deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment.

Point Two

Thus it appears that the questions presented in the petition for certiorari, rest on false premises.

In view of the foregoing considerations (Point One), the three questions presented by petitioner may receive summary answers.

1. 'Is it a denial of due process to convict one of contempt of court summarily and without trial when the alleged misconduct is not committed in open court?' (petition, p. 4; argued pp. 8-10 *idem.*).

The short answer is that in this particular case, the alleged misconduct *was* committed in open court. It was committed in the presence of circuit judges acting in a judicial capacity while conducting a grand jury investigation pursuant to Michigan law interpreted by the highest court of the State (*In re Slattery, supra*).

2. Even assuming a witness has testified in open court; is it a denial of due process to convict him of

[30]

The word is used for lack of a better term.

contempt of court summarily and without trial for alleged false testimony, where the falsity of such testimony, is not self-evident?' (petition p. 4; argued pp. 10-11).

Counsel recognizes 'that where the falsity of testimony is self-evident, a summary conviction may follow (e.g., *U.S. v. Apel*, 211 Fed. 495)'. But he urges that where evidence is required to establish the falsity of testimony then due process requires a notice and a hearing. That is correct, but again the premises are false.

Petitioner's offense did not consist of 'false testimony', for the court below found sufficient evidence to establish the fact that his answers were evasive; that they 'fobbed off' inquiry; and that therefore his conduct in the presence of the judges was contemptuous, as contemptuous as though he refused to answer the questions propounded.

3. 'Is it a denial of due process summarily to convict one of contempt of court by reason of alleged perjury before a one-man grand jury?' (petition p. 4; argued, pp. 11-12).

This case is readily distinguishable from *In re Michael*, 326 U.S. 224; there, alleged false testimony was given by a witness before a federal grand jury convened pursuant to the laws of the United States; and this Court held that false testimony before a grand jury does not obstruct the judicial process and may not therefore be the basis of a conviction of contempt of court. Here, evasive answers were made by a witness called upon to testify before a circuit judge sitting as a one-man grand jury under a law of the State of Michigan. As interpreted by Michigan's highest court,

that law is held to mean that such a grand jury investigation calls for exertion of judicial power, and that evasive answers so given constitute contempt of court.

V

Conclusion.

We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

Eugene F. Black

Attorney General of the State of
Michigan

Edmund E. Shepherd

Solicitor General of the State of
Michigan

H. H. Warner

Assistant Attorney General of the
State of Michigan

Counsel for Respondent
State of Michigan